STATE OF MICHIGAN
IN THE SUPREME COURT

ELLEN M. OSTROTH and
THANE OSTROTH,

Plaintiffs,

-and-

JENNIFER L. HUDOCK and
BRIAN D. HUDOCK,

Plaintiffs-Appellees,

v

WARREN REGENCY, G.P., L.L.C.
and WARREN REGENCY LIMITED
PARTNERSHIP,

Defendants,

-and-

EDWARD SCHULAK, HOBBS &
BLACK, INC.,

Defendant-Appellant.

Supreme Court
Docket No. 126859

Court of Appeals
Docket No. 245934

Lower Court Civil
Action No. 00-1912-CE

ACEC/MICHIGAN, INC.'S AMICUS CURIAE BRIEF IN SUPPORT OF EDWARD SCHULAK, HOBBS & BLACK, INC.

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STATEMENT IDENTIFYING ORDER APPEALED FROM

Amicus Curiae ACEC/Michigan, Inc. supports Defendant-Appellant Edward Schulak, Hobbs & Black, Inc.'s Appeal from the July 8, 2004 decision of the Court of Appeals in *Ostroth v Warren Regency, G.P., L.L.C.*, 263 Mich App 1; 687 NW2d 309 (2004). A copy of the Court of Appeals' opinion is attached as Exhibit A.

STATEMENT IDENTIFYING ALLEGATIONS OF ERROR AND RELIEF SOUGHT

The Court of Appeals committed reversible error in construing the statute of repose that *applies* to actions against architects, engineers, and contractors under MCL 600.5839 as a statute of limitations, thereby negating the limitations period prescribed by MCL 600.5805. In reaching this result, the Court inexplicably departed from its ten-year old decision in *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994), which held that MCL 600.5839 is a statute of repose only and that the statute of limitations contained in MCL 600.5805 continues to apply to architects, engineers, and contractors. This departure from *Witherspoon* is unwarranted and creates an irreconcilable conflict that merits review by this Court. The proper statute of limitations is found at MCL 600.5805(6), imposing a 2-year limitation on malpractice actions.

STATEMENT OF THE ISSUES

Does MCL 600.5839(1) preclude application of the statutes of limitation prescribed by MCL 600.5805?

Plaintiffs-Appellees say "Yes."
Defendant-Appellant says "No."
Amicus Curiae ACEC/MI says "No."

If MCL 600.5805 applies, does the two-year statute of limitations applicable to malpractice apply to the claim asserted against defendant architecture firm Edward Schulak, Hobbs & Black?

Plaintiffs-Appellees say "No."
Defendant-Appellant says "Yes."
Amicus Curiae ACEC/MI says "Yes."

STATEMENT OF FACTS AND INTEREST OF AMICUS CURIAE ACEC/MI

Amicus Curiae ACEC/Michigan, Inc. ("ACEC/MI"), a corporate entity organized and existing under the laws of the State of Michigan, is the Michigan affiliate of the national American Council of Engineering Companies headquartered in Washington, D.C. As an affiliate of the American Council of Engineering Companies, ACEC/MI seeks to advance the engineering profession and to improve the quality of life for Michigan citizens insofar as they are affected by public and private civil and structural engineering projects.

On July 8, 2004, the Michigan Court of Appeals rendered a decision on an issue of great significance to ACEC/MI and its member organizations. In *Ostroth v Warren Regency, G.P., L.L.C.*, 263 Mich App 1; 687 NW2d 309 (2004), the Michigan Court of Appeals held that the six-year statute of repose contained in MCL 600.5839, rather than the two-year period prescribed by MCL 600.5805(6), establishes the period of limitations applicable to claims against architects and engineers that arise out of an improvement to real property. In reaching this conclusion, the Court of Appeals relied in part on dicta contained in this Court's decision in *O'Brien v Hazelet & Erdal*, 410 Mich 1; 299 NW2d 336 (1980). Moreover, the Court of Appeals inexplicably departed from controlling precedent set down ten years earlier in the case of *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994).

In *Witherspoon*, the Court of Appeals recognized that there is a difference between a statute of limitations and a statute of repose and directed that the provisions of MCL 600.5839 (the statute of repose applicable to architects, engineers, and contractors) be read in harmony with the statute of limitations provisions of MCL 600.5805. Thus, the Court in *Witherspoon* held

that the statute of limitations for negligence claims against contractors is determined by MCL 600.5805, not MCL 600.5839.

The Court of Appeals in *Ostroth* refused to recognize the important distinction between these statutes and construed MCL 600.5839 as a statute of limitations, as well as a statute of repose. As a result, the Court of Appeals in *Ostroth* erroneously ruled that MCL 600.5805 does not determine the period of limitations for claims against architects and engineers. The court effectively lengthened the period of limitations for such claims from two to six years.

On May 12, 2005, this Court granted Schulak's Application for Leave to Appeal from the Court of Appeals' decision. Amicus ACEC supports Schulak's appeal and urges this Court to correct the procedural and substantive errors committed by the Court of Appeals in departing from controlling precedent. The impact of the *Ostroth* decision on all persons and entities engaged in architecture, engineering, and construction cannot be overstated. Architectural and engineering firms that factored the shorter statute of limitations into the risks associated with project bids did so in reliance on *Witherspoon* and will be negatively impacted if the *Ostroth* decision is allowed to stand. Moreover, the prolonged litigation exposure that will result from the *Ostroth* decision will increase the costs of future construction projects in Michigan, detrimentally affecting the people of this State. It is critical that this Court decisively settle the conflict between *Ostroth* and *Witherspoon*.

ACEC/MI and its member engineering firms have a pervasive interest in the clear, rational, and harmonious application of MCL 600.5839 and MCL 600.5805, and they seek to ensure that each statute is given the effect intended by the Legislature such that predictability and economic stability are assured. ACEC/MI submits this Amicus Curiae Brief in furtherance of this purpose.

STANDARD OF REVIEW

A question of statutory interpretation is subject to de novo review, as are issues involving the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DEPARTING FROM *WITHERSPOON'S* ANALYSIS OF THE STATUTE OF REPOSE.

A. The Michigan "Statute of Repose" Does Not Extend the Statute of Limitations.

The "statute of repose" referred to in MCL 600.5805(14) and contained within MCL 600.5839 does not extend the two-year statute of limitations that is applicable to claims against architects and engineers. MCL 600.5805(14) states that the "period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839." MCL 600.5839(1) states in pertinent part:

> No person may maintain any action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of such injury against any state licensed architect or professional engineer performing or furnishing the design or supervision of construction of such improvement or against any contractor making the improvement, more than 6 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or 1 year after the defect is discovered or should have been discovered, provided that the defect constitutes the proximate cause of the injury or damage for which the action is brought and is the result of gross negligence on the part of the contractor or licensed architect or professional engineer. However, no such action shall be maintained more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement.

In *Witherspoon*, the Court of Appeals, in clear recognition and acknowledgement that there is a difference between a statute of repose and a statute of limitations, held that these provisions do not lengthen the statute of limitations otherwise applicable to such a claim.[1] *Witherspoon* involved a claim by an injured driver against the contractor that installed a highway guardrail. The Court was asked to decide whether plaintiff's claim was governed by MCL 600.5839 or MCL 600.5805(10),[2] the three-year general negligence statute of limitations for injuries to persons or property. The Court noted that the current MCL 600.5805(14) (which was MCL 600.5805(10) at the time of the *Witherspoon* decision) directed attention to MCL 600.5839 and that this "later added" provision was to "underscore" the Legislature's intent "to grant § 5839 primacy over other arguably applicable periods of limitation, running from the time of discovery, whose effect would defeat the repose aspect of § 5839." *Witherspoon* at 244. The issue in *Witherspoon*, however, was "whether the six-year period applicable to ordinary negligence under § 5839 precludes application of § 5805(8) where the cause of action arises within six years after use or acceptance of the improvement." *Witherspoon* at 246 (emphasis added). As the Court explained the inquiry:

> [R]ecognizing that § 5839 is a specific statute of limitations, which normally controls over a general statute of limitations [citation omitted], the question is whether § 5839, in tandem with § 5805(10), renders § 5805(8) inapplicable.

Id. The Court held that it did not. The Court said:

> We understand § 5839, together with § 5805(10) [now MCL 600.5805 (14)], to set forth an emphatic legislative intent to protect architects, engineers, and

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[1] A statute of repose, an example of which is stated in MCL 600.5839, bars litigation after the designated time period has elapsed no matter when the cause of action accrues. A statute of limitations is the time period in which an action must be commenced after the cause of action accrues.

[2] At the time that *Witherspoon* was decided, the subsection was MCL 600.5805(8). Due to subsequent amendments to the statute, the subsection is now MCL 600.5805(10). Importantly, however, the language of the subsection has not changed since the ruling in *Witherspoon*.

> contractors from stale claims. However, because we must interpret the statute as a whole, reading each section in harmony with the rest of the statute, [citation omitted], we do not understand those provisions to expand the general three-year period of viability for injury claims under § 5805(8) [now MCL 600.5805(10)] to a six-year period insofar as the claims apply to those protected by § 5839. While it is possible, as plaintiff argues, that the Legislature intended to expand the period of liability as a "trade-off" for the protection afforded by the provision, we find no hint of such an intent in the provision itself or elsewhere. Moreover, our adoption of this interpretation would necessarily render § 5805(8) [now MCL 600.5805(10)] nugatory in such cases, an effect that this Court must avoid in construing statutes. [citation omitted]. Because the Legislature in enacting these provisions did not clearly indicate that it intended through § 5839 to breathe additional life into claims that would otherwise have expired under § 5805, we choose not to read that intention into the statute.

Witherspoon at 247-248 (emphasis added). See also *Stanislawski v Calculus Construction Co*, Ct App Dkt No 145467 (April 7, 1994) (unpublished),[3] following *Witherspoon* and holding that despite MCL 600.5805(14) (which was MCL 600.5805(10) at the time of the *Stanislawski* decision), the negligence claim against the contractor was governed by the period of limitations applicable to injuries to persons or property, rather than MCL 600.5839.

While *Witherspoon* and *Stanislawski* address the question of what period of limitations should be applied to claims against contractors under MCL 600.5805(10), the same analysis applies to MCL 600.5805(6) governing actions for malpractice, including claims against architects and engineers. This is particularly true given that the statute's purpose was to relieve "professionals of open-ended liability for alleged defects in their workmanship" and not to breathe life into claims that would have otherwise expired. *Witherspoon* at 245, 247-248.

MCL 600.5839, as originally enacted, did not apply to contractors. Initially, the statute of repose contained in MCL 600.5839 barred actions against architects and engineers arising out of an improvement to real property six years after occupancy, use, or acceptance of the improvement, but such actions could still proceed against contractors. The goal of the original

[3] A copy of the Court's opinion in *Stanislawski* is attached as Exhibit B.

statute was to limit the liability of architects and engineers by establishing a date beyond which a claim could not accrue. As the Court explained in *O'Brien v Hazelet & Erdal*, 410 Mich 1, 14; NW2d (1980):

> The Legislature chose to limit the liability of architects and engineers in order to relieve them of the potential burden of defending claims brought long after completion of the improvement and thereby limit the impact of recent changes in the law upon the availability or cost of the services they provide.

Contractors, however, remained vulnerable to such suits. Therefore, in 1985, MCL 600.5839 was amended to afford contractors the same protection against lawsuits that the statute of repose provided to architects and engineers. MCL 600.5839 now applies equally to architects, engineers, and contractors, and there is no basis for distinguishing between them with respect to the statute's application.

The Court of Appeals ignored this analysis in *Ostroth*. In *Ostroth*, the plaintiffs sought to recover for personal injuries allegedly sustained as a result of environmental hazards arising from the renovation of their workplace. The defendant architectural firm moved for summary disposition, relying upon the two-year statute of limitations applicable to claims for professional malpractice (which was contained in MCL 600.5805(4) at the time but that is now contained in MCL 600.5805(6) as a result of the renumbering of the subsections of MCL 600.5805). The trial court granted the architectural firm's motion for summary disposition, but the Court of Appeals reversed.

On appeal, the court in *Ostroth* identified the central issue as whether the two-year period of limitations for malpractice claims contained in MCL 600.5805(6) (which was MCL 600.5805(4) at the time of the *Ostroth* decision), the three-year general statute of limitations for negligence actions contained in MCL 600.5805(10) (which was MCL 600.5805(8) at the time of the *Ostroth* decision), or "the six-year statute of limitations applicable to professional negligence

claims against architects, engineers and contractors, MCL 600.5839, applies in this case." Although the court labeled MCL 600.5839 as a "statute of limitations," the court recognized that the statute "operates as a statute of repose, preventing a cause of action from ever accruing when the injury is sustained or an accrued action is brought more than six years after the date of occupancy of the completed improvement, or use, or acceptance of the improvement." *Ostroth* at 7. In such a case, the court said:

> the injured party literally has no cause of action. The harm that has been done is damnum asque injuria- a wrong for which the law affords no redress.

Ostroth at 7, quoting *Smith v Quality Constr Co*, 200 Mich App 297, 301; 503 NW2d 753 (1993), citing *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15-16, n 19; 299 NW2d 335 (1980), quoting *Rosenberg v Town of North Bergen*, 61 NJ 190; 293 A.2d 662 (1972). However, the *Ostroth* opinion also noted that this Court referred to the "statute's function as a statute of limitations" in *O'Brien*, explaining that where actions accrue within six years from occupancy of the completed improvement, or use, or acceptance of the improvement "the statute prescribes the time within which such actions may be brought and thus acts as a statute of limitations." *Ostroth* at 8, quoting *O'Brien* at 15. The *Ostroth* court then concluded that "O'Brien held that § 5839 operates as a statute of limitations until the limitations period expires, after which the statute operates as a statute of repose." *Ostroth* at 8.

The Court of Appeals' interpretation of MCL 600.5839 in *Ostroth* is incorrect and misconstrues this Court's "holding" in *O'Brien*. The issue decided by this Court in *O'Brien* was not whether the six-year statute of repose contained in MCL 600.5839 preempted and negated the statute of limitations applicable to claims against architects and engineers under MCL 600.5805. To the contrary, the issue in *O'Brien* was solely whether MCL 600.5839 was unconstitutional either (i) because it denied a cause of action to persons allegedly injured from

negligent design or supervision of construction regardless of when the persons became aware of the negligent design; or (ii) because it limited the tort responsibility of architects and engineers, but not contractors. Accordingly, the statement in *O'Brien* that the *Ostroth* court relied upon in treating MCL 600.5839 as a statute of limitations is not relevant to the issues that were resolved in *O'Brien* and is mere dicta.

The *Ostroth* court also misconstrued the effect of statutory amendments that were designed to extend the statute of repose to contractors. The *Ostroth* court noted that five years after this Court's decision in *O'Brien*, MCL 600.5839 was amended "to permit a one-year discovery provision applicable to gross negligence claims, with a final limitation of ten years." *Ostroth* at 8. The Court further explained:

> The amendment also extended to contractors the protection against stale claims and open-ended liability previously only afforded to architects and engineers. Before this amendment, negligence claims against contractors were governed by the three-year statute of limitations, MCL 600.5805(8) [now MCL 600.5805(10)] ... As a result of the amendment, § 5805(8) [now § 5805(10)] was no longer applicable to contractors. Subsequently, § 5805, which contains the general statutes of limitations, was amended and specifically referenced § 5839. MCL 600.5805(10) [now MCL 600.5805(14)] states:
>
> "The period of limitations for an action against a state licensed architect, professional engineer, land surveyor, or contractor based on an improvement to real property shall be as provided in section 5839."
>
> The addition of this subsection seems to reinforce the *O'Brien* Court's opinion that MCL 600.5839 is not only a statute of repose, but also a statute of limitations.

Ostroth at 9. The *Ostroth* court then concluded that a subsequent decision issued by this Court in *Michigan Millers Mut Ins Co v West Detroit Bldg Co*, 196 Mich App 367; 494 NW2d 1 (1992) "addressed the effect of § 5805(10) [now § 5805(14)] on § 5839 and held that the amendment reflected the Legislature's intent to apply the limitations periods contained in

§ 5839(1) to all actions against contractors and state licensed architects and engineers, regardless of whether the plaintiff was a third-party or had privity with the defendant." *Ostroth* at 10.

The Court of Appeals in *Ostroth* mischaracterized the holding of *Michigan Millers* and the cases that preceded it. When MCL 600.5839 was amended in 1985 to afford contractors the same protection against lawsuits that the statute of repose already provided to architects and engineers, a loophole in the statute of repose remained. Because of the way the statute was worded, various panels of the Court of Appeals had held that the repose provisions of MCL 600.5839 did not apply to a claim *by an owner* against a design professional for defects in the improvement to real property itself. *City of Marysville v Pate, Hirn & Bogue, Inc.*, 154 Mich App 655, 660; 397 NW2d 859 (1986); *Midland v Helgar Construction Co.*, 157 Mich App 736, 741-742; 403 NW2d 218 (1987); and *Burrows v Bidigare/Bublys, Inc.*, 158 Mich App 175, 182; 404 NW2d 650 (1987). The issue addressed in those cases began with *Marysville*. There, the court was asked to decide whether the plaintiff owner could bring an action beyond the six-year statute of repose established by MCL 600.5839. The court held that MCL 600.5839 did not apply to an owner's claim against the project engineer for a deficiency in the improvement itself because the injury asserted in such a claim did not arise out of the defective and unsafe condition of the improvement to real property but rather was itself the injury for which recovery was sought. The court ruled that because MCL 600.5839 did not apply to a claim by an owner for a deficiency in the improvement itself, the trial court correctly applied the general malpractice statute of limitations to the plaintiff owner's claim.

The issue of whether section 5839 applies to a claim by an owner for a deficiency in the improvement itself was subsequently addressed by separate panels of the Court of Appeals in

Midland, supra, Fennel v Nesbitt, Inc, 154 Mich App 644; NW2d (1986) and *Burrows v Bidigare/Bublys, Inc, supra*, all of which reached the same result.

In order to eliminate this loophole and to ensure that the statute of repose contained in MCL 600.5839 applies to any and all claims against design professionals and contractors, irrespective of whether they arise from defects to the improvement itself, the Legislature amended the statute in 1988 to add what is now MCL 600.5805(14) [referred to as MCL 600.5805(10) in the *Ostroth* opinion]. *Michigan Millers* recognized that the purpose of the amendment was to ensure that the statute of repose applies to all claims against architects, engineers, and contractors, including claims that involve defects in the improvement itself and irrespective of the time at which the claim is discovered. *Michigan Millers* at 374-376, 378. Thus, while the court in *Michigan Millers, supra*, observed that the Legislature added what is now MCL 600.5805(14) to set aside the holdings in *Marysville*, *Midland* and *Burrows*, the holdings that were "set aside" related solely to whether owners could commence an action for deficiencies in the improvement to real property itself. The court in *Michigan Millers* held that the plaintiff owner's claim against a contractor was barred by MCL 600.5839 even though the plaintiff contended that the claim was timely because it involved damage to the improvement itself and was filed within three years of the time that the plaintiff discovered the claim.

Indeed, as explained in *Witherspoon*, MCL 5805(14) was not added for the purpose of lengthening the limitations period otherwise applicable to claims against architects, engineers, or contractors, but rather to further protect architects, engineers, and contractors from liability by underscoring the Legislature's "intent to grant § 5839 primacy over other arguably applicable periods of limitation, running from the time of discovery, whose effect would defeat the repose aspect of § 5839." *Witherspoon, supra* at 245-246. In other words, the Legislature sought to

ensure that a claim could not accrue more than six years after the use, occupancy, or acceptance of the improvement (or after ten years in cases of gross negligence) regardless of whether or when the defect or damages were discovered.

Given this purpose, the Court in *Witherspoon* correctly ruled that MCL 600.5839 did not expand the otherwise applicable statute of limitations, and other courts have reached the same result. *See, e.g., City of Dearborn v DLZ Corp*, 111 F Supp 2d 900, 903-904 (ED Mich 2000) (applying two-year limitations period to malpractice action against engineer in case involving the construction of a retention treatment tunnel). The *Ostroth* Court was likewise obligated to follow the *Witherspoon* decision despite its conclusion that "*Witherspoon* was wrongly decided." See MCR 7.215(J)(1):

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

However, the Court of Appeals departed from *Witherspoon* and ignored *Witherspoon's* refusal to render the periods of limitations contained in MCL 600.5805 "nugatory." In rejecting the reasoning of *Witherspoon*, the *Ostroth* court erroneously concluded that rendering the periods of limitations contained in MCL 600.5805 nugatory was permissible because "a specific statute of limitations controls over a general statute of limitations" irrespective of what the rules of statutory construction would otherwise require. *Ostroth* at 13-14. The *Ostroth* Court noted that, although it would be bound to follow the precedent established by *Witherspoon*, "we find that our Supreme Court's decision in *O'Brien, supra*, and this Court's decision in *Michigan Millers*, which was decided two years before *Witherspoon*, are controlling." The *Ostroth* court thus concluded:

> Because *O'Brien, supra* at 15, held that § 5839 was both a statute of limitations and a statute of repose, and the subsequent amendments of § 5839 and § 5805 as

> discussed in *Michigan Millers*, affirm this position, we find that the trial court erred in applying the two-year statute of limitations set forth in § 5805(4) [now § 5805(6)]. We hold that the special six-year statute of limitations in § 5839(1) applies to all negligence actions against architects, contractors, and engineers.

Ostroth at 16.

O'Brien and *Michigan Millers* are not authority for the *Ostroth* result. Neither case held that MCL 600.5839 is both a statute of limitations and a statute of repose because, quite simply, that was not the issue that the courts in those cases were asked to decide. *Ostroth's* result-driven analysis is no match for *Witherspoon*. This Court should remedy the erroneous decision by the Court of Appeals.

II. THE TWO-YEAR STATUTE OF LIMITATIONS FOR MALPRACTICE APPLIES TO CLAIMS AGAINST ARCHITECTS AND ENGINEERS

This Court's Order granting Schulak's Application for Leave to Appeal directed the parties to brief the question of whether the two-year statute of limitations for malpractice applies to the defendant architecture firm. MCL 600.5805(6) states: "Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice." It is undisputed that Plaintiff's Complaint in this matter alleged that Defendant Schulak committed architectural malpractice. Michigan courts have specifically found that the 2-year malpractice statute of limitations applies to doctors, dentists, pharmacists, accountants and attorneys. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322; 535 NW2d 187 (1995); *Sam v Balardo*, 411 Mich 405; 308 NW2d 142 (1981); *Becker v Meyer Rexall Drug Co*, 141 Mich App 481; 367 NW2d 424 (1985). The two-year statute of limitations for malpractice has also been applied to architects and engineers. *City of Midland v Helger Construction Co*, 157 Mich App 736; 403 NW2d 218 (1987); *City of Dearborn v DLZ Corporation*, 111 F Supp 2d 900 (ED Mich 2000).

In *City of Midland v Helger Construction Co*, 157 Mich App 736; 403 NW2d 218 (1987), the plaintiff/appellant argued that the trial court erred in applying the two-year statute of limitations to the architectural malpractice claim. In rejecting the plaintiff's claim, the Michigan Court of Appeals found that "the general malpractice statute applies to architects as well as to health care professionals. Thus, plaintiff's contention that it applies only to health care professionals must be rejected." *Id.* at 741, citing to *Sam v Balardo*, 411 Mich 405; 308 NW2d 142 (1981) and *Chapel v Clark*, 117 Mich 638, 640; 76 NW62 (1898).[4]

The applicability of the two-year malpractice statute of limitations to claims against architects was similarly recognized in *Lantz v Private Satellite Television Inc*, 813 F Supp 554, 555 (ED Mich 1993) (recognizing that state courts have extended the malpractice cause of action beyond attorneys and medical professionals to include, *inter alia*, architects); *see also National Sand Inc v Nagel Construction Inc*, 182 Mich App 327; 451 NW2d 618 (1990) (recognizing that the *Midland* decision applied the two-year malpractice statute of limitations to claims against architects). As with architects, the two-year statute of limitations has been applied to engineers. *City of Dearborn v DLZ Corporation*, 111 F Supp 2d 900 (ED Mich 2000). The malpractice statute of limitations was properly applied to architects and engineers in these cases. Here, under the standards promulgated by this Court, it is clear that malpractice claims against architects and engineers fall under the two-year statute of limitations in MCL 600.5805(6).

In *Sam v Balardo*, 411 Mich 405; 308 NW2d 142 (1981), this Court established the standard for determining whether a claim against a particular profession constituted a

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[4] As set forth above, the *Midland* court also held that MCL 600.5839 did not apply to a claim by an owner for a deficiency in the improvement to real property itself. Although this holding was "set aside" by the addition of what is now MCL 600.5805(14), the *Midland* Court's finding that the "malpractice statute applies to architects as well as to health care professionals" was not "set aside" by the amendments to MCL 600.5805.

"malpractice" claim such that the two-year statute of limitations would apply. Pursuant to *Sam*, "the definition of malpractice and liability therefor are to be determined by resort to common law." *Id.* at 424. Of particular relevance is whether the common law has "traditionally" recognized malpractice against the profession. *Sam*, *supra* at 333; *Local 1064 RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322; 535 NW2d 187 (1995); *National Sand*, *supra*.

In *Local 1064*, *supra*, this Court reaffirmed *Sam* and clarified the proper analysis. In determining that accountants were encompassed within the malpractice statute of limitations, this Court explicitly looked "beyond Michigan's appellate reports" to establish that "accountants have been subjected to common-law malpractice liability with increasing frequency since at least the mid-1900's." *Id.* at 332, citing cases issued between 1930 and 1978 from various courts. In this case, the inquiry is whether architects have traditionally been subjected to common-law malpractice liability. *See Sam, supra; Local 1064, supra; National Sand, supra.* As recognized by Justice Moody's concurrence in *Sam*, "it will be difficult to distinguish on a principled basis between physicians and lawyers, on the one hand, and such professions as accountants, chiropractors, psychologists and architects on the other." *Sam*, *supra* at 441, Moody, J. concurring, emphasis added.

As early as 1898, this Court recognized that "the responsibility of an architect does not differ from that of a lawyer or physician." *Chapel v Clark*, 117 Mich 638, 640; 76 NW62 (1898); *see also Sam*, *supra* at 441, Moody, J. concurring, quoting *Bayne v Everham*, 197 Mich 181, 199-200 (1917). Furthermore, in the early 1900's, the common law recognized that an engineer or architect "may be liable to his employer for shortcomings in the nature of malpractice." *Northern Pac Ry Co v Goss*, 203 F 904, 910 (8th Cir 1913). *See also, Rolf Homes Inc v Superior Court of San Mateo County*, 186 Cal App 2d 876; 9 Cal Rptr 142 (1960) (claim

against engineers for malpractice); *Alexander* v *Hammarberg*, 103 Cal App 2d 872, 878; 230 P 2d 399 (1951) (recognizing malpractice suit against architect); *Legg* v *Dunleavy*, 80 Mo 558, 560 (1883). In the 20th Century, courts extended malpractice rules from the exclusive province of medical professionals to other professionals ***such as engineers and architects***. *See e.g., Steelworkers Holding Co v Menefee*, 255 Md 440, 443; 258 A2d 177, 179 (Md 1969); *Dorsey & Sons v Frishman*, 291 F Supp 794, 796 (D DC 1968).

Moreover, courts around the country have long held that architects and engineers owe a duty to reasonably exercise their skill, ability, judgment, and taste without neglect. *T.O. Bancroft v Indemnity Insurance Co*, 203 F Supp 49, 53 (1962); *Peerless Ins Co v Cerny & Assoc*, 199 F Supp 951, 953 (D Minn 1961); *Wills v Black And West Architects*, 1959 OK 162 344 P2d 581, 584 (Okla 1959); *Scott & Payne v Potomac Ins Co*, 217 Ore 323; 341 P2d 1083, 1086-1087 (Ore 1959); *Looker v Gulf Coast Fair*, 203 Ala 42; 81 So 832 (1919); *Bayshore Development Co v Bondfoey*, 75 Fla 455; 78 So 507 (1918); *Block v Happ*, 144 Ga 145; 86 SE 316 (1915); *Trunk & Gordon v Clark*, 163 Iowa 620; 145 NW 277 (1914); *Simpson Bros Corp v Merrimac Chemical Co*, 248 Mass 346; 142 NE 922 (1924); *Chapel v Clark*, 117 Mich 638; 76 NW 62 (1898); *Nieman-Irving & Co v Lazenby*, 263 NY 91; 188 NE 265 (1933); *White* v *Pallay*, 119 Or 97; 247 P 316 (1926). The application of such a standard is the hallmark of a malpractice claim against a professional. *See Sam, supra*, at 435-436.

As recognized in *Local 1064* with regard to accountants, "Courts and commentators recognizing liability for the malpractice of an [architect or engineer] have not created a new cause of action, but merely have applied the common law principles articulated in malpractice actions generally." *Id.* at 333. Applying the analysis of *Sam* as clarified in *Local 1064*, it is clear that the profession of architecture (as well as the profession of engineering) "is a profession

traditionally subject to common-law malpractice liability." *Local 1064, supra* at 333. Accordingly, the two-year statute of limitations for malpractice actions applies to the claims against the Defendant architecture firm, and should likewise apply to engineers. MCL 600.5805(6).

CONCLUSION AND RELIEF REQUESTED

In accordance with the *Witherspoon* analysis, MCL 600.5805 provides the applicable statute of limitations for contractors, architects, and engineers. The Court of Appeals' decision in *Ostroth* turns *Witherspoon* on its head and ignores the intent of the Legislature, as expressed in the statute. It is left to this Court to reverse the *Ostroth* decision, which departs so dramatically from *Witherspoon* and throws this area of the law into chaos. Accordingly, Amicus Curiae ACEC/MI requests that this Court reverse the Court of Appeals' decision in *Ostroth* and apply the two-year limitation period applicable to actions for malpractice to the asserted claims.

Respectfully submitted,

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